Equiticorp Holdings Ltd (in statutory management) v Mak Kum Choon & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(A)-383–02 OF 2018 AND W-02(IM)-420–02 OF 2018
TENGKU MAIMUN, MARY LIM AND HASNAH HASHIM JJCA
7 AUGUST 2019

Companies and Corporations — Winding up — Liquidators — Application for directions allowed by High Court — Whether appellants lacked locus standi — Whether directions given by learned judge under s 237(3) of Companies Act 1965 non-appealable — Whether directions sought ought to be granted — Companies Act 1965 s 237(3)

These two appeals were heard together, having arisen out of the same decision of the High Court made pursuant to s 237(3) of the Companies Act 1965 ('the Act'). Pursuant to a loan agreement, Overseas Union Bank Ltd ('OUB') granted United Securities Sdn Bhd ('USSB') a loan of USD18.7m for the purchase of 2.5m shares amounting to 50% equity in a company known as City Centre Sdn Bhd ('CCSB'). As part of the terms of the loan agreement, USSB executed a debenture whereby a charge was created in favour of OUB over the shares purchased ('CCSB shares') and all other assets of USSB. Subsequently, OUB merged with its holding company, United Overseas Bank LtdL in Singapore ('UOB Singapore'), and UOB Singapore took over all the businesses and undertaking of OUB. The directors of USSB also executed joint and several guarantees to UOB Singapore. Pursuant to cl 4.2 of the debenture, the CCSB shares were then registered in the name of UOB Nominees, the nominee company of OUB and now of UOB Singapore. On 25 April 2000, CCSB was compulsorily wound up. The present liquidators, Mak Kum Choon and Yeoh Siew Ming ('private liquidators') replaced the official receiver. On 30 January 2007, USSB was also compulsorily wound up, and a private liquidator was appointed. CCSB owned 16 parcels of land located within Kuala Lumpur ('CCSB lands'). In May 2017, the liquidators of CCSB sold the CCSB lands for approximately RM516m. On 18 September 2017, the private liquidators moved the court under s 237(3) of the Act, seeking directions as to whether UOB Nominees was the sole and rightful contributory of CCSB for purposes of distribution of surplus funds of RM442m after considering CCSB's liabilities and other liquidation expenses. The application was opposed by USSB as well as Equiticorp Holdings Ltd ('Equiticorp'), the latter being an unsecured creditor of USSB. The High Court allowed the application and hence these separate appeals by USSB and Equiticorp. In opposition to the two appeals lodged, UOB Nominees, the principal respondent in these appeals raised two preliminary issues ie: (a) both USSB and Equiticorp lacked locus

standi; and (b) the directions given by the learned judge on were non-appealable. A

Held, allowing the appeals and setting aside the order of the High Court:

(1) The directions or orders sought by the liquidators sought specifically to order any surplus, if any, to be paid to USSB. As for Equiticorp, it was a member of the Committee of Inspection of CCSB, a body which was still in existence and ought to have been consulted. Both USSB and Equiticorp were interested and affected parties who had the requisite locus standi to be heard in the proceedings before the High Court and to prosecute their respective appeals. Therefore, this preliminary objection was rejected (see paras 22–23). B C

(2) The 'directions' or orders sought in this appeal were not in the true nature of directions of advice and guidance. It was in the form of final orders, affecting substantive rights of the affected parties. The use or choice of words and phrases by the Federal Court in *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 in relation to 'encl 485 direction is only an administrative proceeding by way of advice' and that 'encl 485 is non-appealable' could not be assumed that the view of the Federal Court was of general application, that every application invoking s 237(3) of the Act was always non-appealable. The cautionary approach strongly suggested that each application must be examined in order to determine its true intent and purpose, before s 237(3) of the Act might be said to properly apply, as it was intended to apply. The court necessarily had to ask itself whether s 237(3) of the Act had been properly, suitably or appropriately invoked before proceeding to consider the application on its terms. Section 237(3) of the Act was not available nor was it suitable for applications under the guise of directions for general administration when the pith and substance of the application was to decide substantive questions as against persons making proprietary claims adverse to the assets of the wound up company. The purported 'directions' sought or posed by the liquidators were not administrative directions at all. The directions sought inter alia concerned substantive rights of parties who were not even before the court and s 237(3) of the Act mechanism or procedure was not suitable or appropriate for such purpose. The matter of entitlement to the surplus funds was necessarily related to matters of substantive rights and liabilities of parties or entities including parties who were not before the winding up court. These matters ought to be dealt with in or through separate proceedings, initiated by the appropriate parties, whether UOB Nominees, USSB or Equiticorp or even UOB Singapore. The circumstances and the concerns of USSB and Equiticorp were valid and justified in construing the 'directions' were not in the true nature of directions seeking advice or guidance of or from the court on administrative matters as envisaged D E F G H I

under s 237(3) of the Act. The directions were final orders determinative of substantive rights of various parties. Therefore, this preliminary objection was also without basis and dismissed (see paras 25, 42, 76, 88, 90–91 & 93–94).

(3) The learned judge had plainly fallen into error in granting the application in the terms sought. Such a direction was somewhat 'peculiar' as it summarily yet effectively and finally determined the distribution of surplus funds or assets of CCSB to be paid to the creditor of USSB, ie, UOB Singapore, thereby settling the debt of USSB. Before any part of the surplus funds may be applied by UOB Nominees, there must be a proper determination of the 'legal entitlement under the relevant security documents', whether of UOB Nominees or UOB Singapore. That determination of 'legal entitlement under the relevant security documents' could not be conducted at the level of the winding up court dealing with CCSB's liquidation, but by the liquidators of USSB and in the relevant winding up proceedings dealing with USSB's liquidation. Being registered shareholders of UOB Nominees pursuant to the debenture neither qualified or equated to UOB Nominees as the holding company of CCSB. It remained shareholder due to the loan agreement and by virtue of the debenture. The concerns and objections of USSB and Equiticorp were valid and founded. The liquidators had not undertaken the duties entrusted under ss 214 and 244 of the Act; nor had they referred the matter to the Committee of Inspection or even approached the court for a dispensation of the list of contributories. Until they had undertaken that duty, s 237(3) of the Act was not available to them as yet. The exercise of settling the list of contributories under s 244 of the Act was a separate overt exercise that must be dealt with first before the matter of approaching for directions under s 237(3) of the Act could even arise. Having locus standi to move the court for the particular order did not necessarily nor ipso facto render UOB Nominees as contributory for the purposes of being liable to contribute towards the assets of CCSB or even to receive the surplus funds. The question of the application of the surplus funds was premature. The distribution could only be held by a liquidator after all the debts of a wound up company had been settled. The whole exercise under s 237(3) of the Act was highly improper. The effect of the decision of the High Court was to ultimately settle the debts of the holding company, USSB at the subsidiary level, CCSB. Such an exercise violated all principles of corporate governance and liquidation of companies (see paras 95, 97–98, 117, 125, 127, 131, 133, 135 & 136).

[Bahasa Malaysia summary

Kedua-dua rayuan ini didengar bersama, timbul daripada keputusan yang sama dari Mahkamah Tinggi yang dibuat berdasarkan s 237(3) Akta Syarikat 1965 ('Akta'). Berdasarkan perjanjian pinjaman, Overseas Union Bank Ltd

('OUB') memberikan pinjaman kepada United Securities Sdn Bhd ('USSB') sebanyak USD18.7 juta untuk pembelian 2.5 juta saham berjumlah 50% ekuiti dalam sebuah syarikat yang dikenali sebagai City Center Sdn Bhd ('CCSB'). Sebagai sebahagian daripada terma perjanjian pinjaman, USSB melaksanakan debentur di mana gadaian dibuat untuk OUB atas saham yang dibeli ('saham CCSB') dan semua aset lain USSB. Selepas itu, OUB bergabung dengan syarikat induknya, United Overseas Bank Ltd di Singapura ('UOB Singapore'), dan UOB Singapura mengambil alih semua perniagaan dan perusahaan OUB. Pengarah USSB juga melaksanakan jaminan bersama dan beberapa jaminan kepada UOB Singapura. Berdasarkan klausa 4.2 debentur, saham CCSB kemudian didaftarkan atas nama UOB Nominee, syarikat penama OUB dan sekarang UOB Singapura. Pada 25 April 2000, CCSB digulungkan secara wajib. Pelikuidasi yang kini, Mak Kum Choon dan Yeoh Siew Ming ('pelikuidasi persendirian') menggantikan penerima rasmi. Pada 30 Januari 2007, USSB juga digulungkan secara wajib, dan pelikuidasi persendirian dilantik. CCSB memiliki 16 bidang tanah yang terletak di Kuala Lumpur ('tanah CCSB'). Pada bulan Mei 2017, pelikuidasi CCSB menjual tanah CCSB dengan harga lebih kurang RM516 juta. Pada 18 September 2017, pelikuidasi persendirian memohon untuk mahkamah di bawah s 237(3) Akta, meminta arahan sama ada UOB Nominee adalah penyumbang tunggal dan sah CCSB untuk tujuan pengagihan lebihan dana sebanyak RM442 juta setelah mempertimbangkan liabiliti CCSB dan perbelanjaan penggulungan lain. Permohonan itu dibantah oleh USSB dan juga Equiticorp Holdings Ltd ('Equiticorp'), yang merupakan pemiutang tidak bercagar USSB. Mahkamah Tinggi membenarkan permohonan itu dan oleh itu permohonan rayuan berasingan oleh USSB dan Equiticorp. Sebagai bantahan dengan dua rayuan yang diajukan, UOB Nominee, responden utama dalam rayuan ini membangkitkan dua isu awal iaitu: (a) kedua-dua USSB dan Equiticorp tidak mempunyai locus standi; dan (b) arahan yang diberikan oleh hakim yang bijaksana tidak boleh dirayu.

Diputuskan, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi:

(1) Arahan atau perintah yang dipohon oleh pelikuidasi memohon secara khusus untuk memerintahkan lebihan, jika ada, untuk dibayar kepada USSB. Bagi Equiticorp, ia adalah anggota Jawatankuasa Pemeriksaan CCSB, sebuah badan yang masih ada dan sepatutnya diminta nasihat. Kedua-dua USSB dan Equiticorp adalah pihak berkepentingan dan terlibat yang mempunyai locus standi yang diperlukan untuk didengar dalam prosiding di hadapan Mahkamah Tinggi dan untuk menuntut rayuan masing-masing. Oleh itu, bantahan awal ini ditolak (lihat perenggan 22–23).

(2) 'Arahan' atau perintah yang dipohon dalam rayuan ini tidak dalam arahan nasihat dan panduan yang sebenar. Ia dalam bentuk perintah

akhir, mempengaruhi hak-hak substantif pihak-pihak yang terlibat. Penggunaan atau pilihan kata dan frasa oleh Mahkamah Persekutuan di *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 berkaitan dengan 'arahan lampiran 485 hanyalah prosiding pentadbiran dengan nasihat' dan bahawa 'lampiran 485 tidak boleh dirayu' tidak dapat diandaikan bahawa pandangan Mahkamah Persekutuan adalah penggunaan umum, bahawa setiap permohonan yang menggunakan s 237(3) Akta selalu tidak boleh dirayu. Pendekatan berwaspada sangat menyarankan agar setiap permohonan harus diperiksa untuk menentukan maksud dan tujuan sebenarnya, sebelum s 237(3) Akta dapat dikatakan digunakan dengan betul, seperti yang dimaksudkan untuk digunakan. Mahkamah semestinya harus bertanya kepada dirinya sendiri sama ada s 237(3) Akta telah digunakan dengan betul, sesuai atau tepat sebelum meneruskan pertimbangan permohonan tersebut dengan termanya. Seksyen 237(3) Akta tidak tersedia atau tidak sesuai untuk permohonan di bawah alasan arahan untuk pentadbiran umum ketika inti dan isi dari permohonan itu adalah untuk memutuskan persoalan substantif terhadap orang yang membuat tuntutan hak milik yang merugikan aset syarikat yang telah digulung. 'Arahan' yang dipohon atau dibangkitkan oleh pelikuidasi sama sekali bukan arahan pentadbiran. Arahan yang dipohon antara lain berkaitan hak substantif pihak yang bukan di hadapan mahkamah dan mekanisme atau prosedur s 237(3) Akta tidak sesuai atau wajar untuk tujuan tersebut. Perkara hak lebihan dana semestinya berkaitan dengan perkara hak dan liabiliti substantif pihak atau entiti termasuk pihak yang tidak berada di hadapan mahkamah penggulungan. Perkara-perkara ini harus ditangani dalam atau melalui prosiding berasingan, yang dimulakan oleh pihak-pihak yang sesuai, baik UOB Nominees, USSB atau Equiticorp atau bahkan UOB Singapura. Keadaan dan keprihatinan USSB dan Equiticorp adalah sah dan dibenarkan dalam menafsirkan 'arahan' itu bukan dalam keadaan sebenar arahan yang memohon nasihat atau bimbingan atau daripada mahkamah mengenai hal-hal pentadbiran seperti yang dijangkakan di bawah s 237(3) Akta. Arahan itu adalah perintah akhir yang menentukan hak substantif pelbagai pihak. Oleh itu, penolakan awal ini juga tanpa asas dan diketepikan (lihat perenggan 25, 42, 76, 88, 90–91 & 93–94).

(3) Hakim yang bijaksana jelas terkhilaf dalam memberikan permohonan dengan terma yang dipohon. Arahan seperti itu agak 'aneh' kerana secara ringkas tetapi berkesan dan akhirnya menentukan pengagihan lebihan dana atau aset CCSB yang akan dibayar kepada pemiutang USSB, iaitu, UOB Singapura, dengan itu melunaskan hutang USSB. Sebelum mana-mana bahagian lebihan dana dapat digunakan oleh UOB Nominees, harus ada penentuan yang tepat mengenai 'kelayakan undang-undang di bawah dokumen jaminan yang relevan', sama ada

UOB Nominees atau UOB Singapura. Penentuan 'hak undang-undang di bawah dokumen jaminan yang relevan' tidak dapat dilakukan di peringkat mahkamah penggulungan yang menangani penggulungan CCSB, tetapi oleh pelikuidasi USSB dan dalam proses penggulungan yang berkaitan dengan penggulungan USSB. Sebagai pemegang saham berdaftar UOB Nominees berdasarkan debentur tidak layak atau disamakan dengan UOB Nominees sebagai syarikat induk CCSB. Ia kekal sebagai pemegang saham kerana perjanjian pinjaman dan berdasarkan debentur. Kebimbangan dan bantahan USSB dan Equiticorp adalah sah dan berasas. Pelikuidasi tidak menjalankan tugas yang diamanahkan di bawah ss 214 dan 244 Akta; mereka juga tidak mengemukakan hal tersebut kepada Jawatankuasa Pemeriksaan atau bahkan meminta mahkamah untuk mengeluarkan senarai penyumbang. Sehingga mereka menjalankan tugas itu, s 237(3) Akta belum tersedia bagi mereka. Kaedah menyelesaikan senarai penyumbang di bawah s 244 Akta adalah satu tindakan tersendiri yang mesti ditangani terlebih dahulu sebelum perkara memohon arahan di bawah s 237(3) Akta itu dapat timbul. Memiliki locus standi untuk memohon mahkamah untuk perintah tertentu tidak semestinya atau secara ipso facto menjadikan UOB Nominees sebagai penyumbang untuk tujuan bertanggungjawab menyumbang ke atas aset CCSB atau bahkan untuk menerima lebihan dana. Persoalan mengenai permohonan lebihan dana itu terlalu awal. Pembahagian tersebut hanya dapat dilakukan oleh pelikuidasi setelah semua hutang syarikat yang digulung dilunaskan. Keseluruhan pelaksanaan di bawah s 237(3) Akta adalah sangat tidak wajar. Kesan daripada keputusan Mahkamah Tinggi adalah untuk menyelesaikan hutang syarikat induk, USSB di peringkat anak syarikat, CCSB. Tindakan seperti itu melanggar semua prinsip tadbir urus korporat dan penggulungan syarikat (lihat perenggan 95, 97–98, 117, 125, 127, 131, 133 & 135–136).]

Cases referred to

Blackbird Pies (Management) Pty Ltd (No 2), Re [1970] QWN 14 (refd)
Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee [1997] 2 SLR (R) 1 (refd)
Coats v Southern Cross Airlines Holdings Ltd (in liq) (1998) 16 ACLC 13933, CA (refd)
Enviroco Ltd v Farstad Supply A/S [2011] 3 All ER 451; [2011] 2 BCLC 165, SC (distd)
GB Nathan & Co Pty Ltd (in liq), Re (1991) 5 ACSR 673, SC (folld)
Grose (decd), In re [1949] SASR 55 (refd)
House Property and Investment Co Ltd, Re [1954] Ch 576, Ch D (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545; [2018] 3 CLJ 123, FC (refd)
JW Murphy & PC Allen, Re (1996) ACSR 569 (refd)

Jiangshan Investment Consortium Ltd (in liquidation), Re [2007] 3 SLR 614; [2007] 3 SLR (R) 614, HC (refd)
Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd [1988] 3 MLJ 49, HC (refd)
K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v Mbf Finance Bhd & Anor [2005] 2 MLJ 201, FC (refd)
Lim Poh Choo v Absolute Ascend Sdn Bhd & Anor [2008] 3 MLJ 740, HC (refd)
Lin Shoon Jewellers Sdn Bhd v Kedai Emas Mee Chan Sdn Bhd [2005] MLJU 586; [2006] 2 CLJ 644, HC (refd)
North Plaza Sdn Bhd v United Securities Sdn Bhd [2010] 1 MLJ 631, CA (refd)
Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713, FC (distd)
Phoenix Oil and Transport Co Ltd (No 2), Re [1958] 1 All ER 158, Ch D (refd)
Rahaz Sdn Bhd v Faston Group Ltd & Ors and other appeals [2010] 1 MLJ 69, CA (refd)
Sanderson v Classic Car Insurances Pty Ltd (1986) 4 ACLC 114, SC (refd)
Security Provident Fund Ltd (in liq), Re; Rodger v Gourlay (1984) 2 ACLC 594, SC
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526, FC (refd)
Sportsman's Leisure & Hobby Warehouse Pty Ltd (in liq), Re (1989) 7 ACLC 1270,SC (refd)
Statewide Investments Ltd (in liq), Re (1981) 6 ACLR 265, SC (refd)
TTC (SA) Pty Ltd (in liq), Re (formerly Tom the Cheap (SA) Pty Ltd (1983) 7 ACLR 784, SC (refd)
TR Hamzah & Yeang Sdn Bhd v City Centre Sdn Bhd [2014] 1 CLJ 682, HC (refd)
Tooth's Trusts, Re (1877) 5 QSCR 10 (refd)
Teng Chang Khim (appealing as speaker of Selangor State Legislative Assembly) v Badrul Hisham bin Abdullah & Anor [2017] 5 MLJ 567; [2017] 9 CLJ 630, FC (refd)
Yeng Hing Enterprise Sdn Bhd v Liow Su Fah [1979] 2 MLJ 240, FC (refd)

Legislation referred to

Companies (Queensland) Code [AU] ss 379, 379(3), 441
Companies (Winding-Up) Rules 1972 rr 71, 72, 102
Companies Act 1961 [AU] ss 230(3), 237(3)
Companies Act 1965 ss 4, 4(1), 5(3), 74, 79, 100(1), 113, 214, 237(3), 244, 247, 247(2)
Corporations Law [AU] s 479(3)
Income Tax Assessment Act 1936 [AU] s 221P
National Land Code s 327
Trustee Act 1925 [AU] s 63

Appeal from: Companies Winding-Up No D6–28–9 of 2000 (High Court, Kuala Lumpur)

Shanti Mogan (SY Liew with her) (Shearn Delamore & Co) in Civil Appeal No W-02(A)-383–02 of 2018 for the appellant.

P Gananathan (Olivia Loh Yuet Ling, Yeoh Kai Ying and Iris Tan Li Chie with him) (Gananathan Loh) in Civil Appeal No W-02(IM)-420–02 of 2018 for the appellant.

Hoi Jack S'ng (Andrea Chew Mei Yng with him) (Lee Hishammuddin Allen & Gledhill) in Civil Appeal No W-02(A)-383–02 of 2018 for the first, second and fourth respondents.

Chin Ze Yi (Ze Yi & Kee) in Civil Appeal No W-02(A)-383–02 of 2018 for the third respondent.

P Gananathan (Olivia Loh Yuet Ling, Yeoh Kai Ying and Iris Tan Li Chie with him) (Gananathan Loh) in Civil Appeal No W-02(A)-383–02 of 2018 for the fifth respondent.

Yoong Sin Min (Poh Choo Hoe and Tai Yong Fung with him) (Shook Lin & Bok) in Civil Appeal No W-02(A)-383–02 of 2018 for the sixth respondent.

Hoi Jack S'ng (Andrea Chew Mei Yng with him) (Lee Hishammuddin Allen & Gledhill) in Civil Appeal No W-02(IM)-420–02 of 2018 for the first, second and third respondents.

Yoong Sin Min (Poh Choo Hoe and Tai Yong Fung with him) (Shook Lin & Bok) in Civil Appeal No W-02(IM)-420–02 of 2018 for the fourth respondent.

Shanti Mogan (SY Liew with her) (Shearn Delamore & Co) in Civil Appeal No W-02(IM)-420–02 of 2018 for the fifth respondent.

Mary Lim JCA (delivering judgment of court):

[1] The above two appeals were heard together, having arisen out of the same decision of the High Court made pursuant to s 237(3) of the Companies Act 1965. The learned judge had granted the liquidators' application made under s 237(3). Preliminary objections on the appealability of the appeals as well as the locus standi of both appellants were raised, quite aside from arguments on the substantive issues.

[2] After an extensive hearing and upon full consideration of the oral and written submissions together with the grounds of decision of the learned judge, we allowed both appeals, concluding that the decision of the learned judge was not within the mandates of the law. These are our reasons in full.

[3] For convenience, we shall refer to the parties by their names.

A MATERIAL BACKGROUND

[4] The underlying facts and relationship of the various parties before the court are not in dispute. Pursuant to a loan agreement dated 17 December 1982, Overseas Union Bank Ltd (OUB) granted United Securities Sdn Bhd
B (USSB) a loan of USD18.7m for the purchase of 2.5 million shares amounting to 50% equity in a company known as City Centre Sdn Bhd (CCSB). As part of the terms of the loan agreement, USSB executed a debenture whereby a charge was created in favour of OUB over the shares purchased (CCSB shares) and all other assets of USSB.

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[5] Subsequently, OUB merged with its holding company, United Overseas Bank Ltd (UOB Singapore) in Singapore, and UOB Singapore took over all the businesses and undertaking of OUB. The directors of USSB also executed joint and several guarantees to UOB Singapore.

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[6] Pursuant to cl 4.2 of the debenture, the CCSB shares were then registered in the name of UOB Nominees, the nominee company of OUB and now of UOB Singapore.

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[7] On 25 April 2000, CCSB was compulsorily wound up. The present liquidators, Mak Kum Choon and Yeoh Siew Ming (private liquidators) replaced the official receiver, who had earlier taken over from the private liquidator who was first appointed following the winding up order.

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[8] On 30 January 2007, USSB was also compulsorily wound up, and a private liquidator was appointed.

[9] CCSB owned 16 parcels of land located within Kuala Lumpur (CCSB
G lands). In May 2017, the liquidators of CCSB sold the CCSB lands for approximately RM516m. On 18 September 2017, the Private Liquidators moved the court under s 237(3) of the Companies Act 1965, seeking directions as to whether UOB Nominees is the sole and rightful contributory of CCSB for purposes of distribution of surplus funds of RM442m after considering
H CCSB's liabilities and other liquidation expenses.

[10] Specifically, the questions posed were:

(1) whether UOB 2006 Nominees (Tempatan) Sdn Bhd (UOB Nominees)
I is the sole and rightful contributory of the respondent (CCSB) for the purpose stated in para (2) below;

(2) in the event para (1) above is answered in the affirmative, whether the surplus or remaining proceeds from the sale of the assets of CCSB, after settlement of the company's debts as owed to its unsecured creditors plus

any lawful outgoings such as any liquidations costs and expenses (surplus funds) may be forwarded to UOB Nominees by the liquidators of CCSB to allow UOB Nominees to apply the surplus funds based on its legal entitlement under the relevant security documents and thereafter remit the surplus thereof (if any) to the Liquidator of United Securities Sdn Bhd (receiver and manager appointed) (in liquidation) (USSB); and

(3) in the event para (1) above is answered in the negative, how then should the liquidators of the respondent deal with the surplus funds.

[11] The application was opposed by USSB as well as Equiticorp Holdings Ltd, the latter being an unsecured creditor of USSB.

[12] On 12 February 2018, the High Court allowed the application in the following terms:

(a) that UOB 2006 Nominees (Tempatan) Sdn Bhd (UOB Nominees) is the sole and rightful contributory of the respondent for the purpose stated in para (2) below;

(b) that the surplus or remaining proceeds from the sale of the assets of the respondent, after settlement of the company's debts as owed to its secured creditors plus any lawful outgoings such as any liquidation costs and expenses (surplus funds) may be forwarded to UOB Nominees by the liquidators of the respondent to allow UOB Nominees to apply the surplus funds based on its legal entitlement under the relevant security documents and thereafter remit the excess thereof (if any) to the liquidator of United Securities Sdn Bhd (receiver and manager appointed) (in liquidation); and

(c) that the costs of this application in the sum of RM5,000 to be paid to the liquidators of the respondent from the assets of the respondent.

[13] USSB and Equiticorp filed separate appeals as follows but the submissions before us made by their respective counsel were substantially adopted by each of them:

(a) Civil Appeal No W-02(A)-383–02 of 2018 by Equiticorp; and

(b) Civil Appeal No W-02(IM)-420–02 of 2018 by USSB.

[14] On 8 March 2018, USSB filed an application for stay of execution of the High Court order pending disposal of the appeal at the Court of Appeal. The application was dismissed on 17 April 2018.

[15] On 20 April 2018, USSB applied to the Court of Appeal for interim relief. Meanwhile, on 23 April 2018, the private liquidators informed USSB that they had paid out RM240m to UOB Nominees on 19 April 2018. This sum has since been transferred to UOB Singapore.

[16] On 24 April 2018, the Court of Appeal granted an interim stay; and on 1 June 2018, granted a stay of the decision of the High Court.

PRELIMINARY OBJECTION TO THE APPEALS

[17] In opposition to the two appeals lodged, UOB Nominees, the principal respondent in these appeals raised two preliminary issues. First, that both USSB and Equiticorp, the respective appellants, lack locus standi; second, that the directions given by the learned judge on 12 February 2018 are non-appealable.

Locus standi

[18] UOB Nominees takes the position that both USSB and Equiticorp are not shareholders, contributories or even creditors of CCSB as debts owed to them have already been fully paid. Since the application before the winding up court concerns the distribution of the surplus funds, USSB and Equiticorp do not have any locus standi to challenge the payment of that surplus funds. In the case of Equiticorp, it is only an unsecured creditor of USSB.

[19] With respect, we disagree. The authorities relied on by UOB Nominees do not support the proposition that USSB and Equiticorp have no locus standi to participate in the liquidation process of CCSB, including pursuing the present appeals; and are in any event distinguishable.

[20] In the High Court decision of *Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49, the opinion that a petitioner who is not a creditor is not entitled to present a petition or apply for a winding up order was made specifically in that context and does not extend to our present circumstances. As for *Rahaz Sdn Bhd v Faston Group Ltd & Ors and other appeals* [2010] 1 MLJ 69 and *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240, those decisions involve suits initiated by plaintiffs in the capacity of beneficial or equitable interest in the relevant company. It was in that context that the Court of Appeal agreed with the High Court that '(A) beneficiary of shares, registered in the name of another as trustee, had no rights in such company' (*Rahaz Sdn Bhd*); and the Federal Court held that 'except as required by law, no person shall be recognised by it as holding any share upon any trust ...' (*Yeng Hing Enterprise*).

[21] That is entirely different from the facts presented in these appeals. A

[22] In the present appeals, the directions or orders sought by the liquidators seek specifically to order any surplus, if any, to be paid to USSB. As for Equiticorp, it is a member of the Committee of Inspection of CCSB, appointed on 23 December 2013, (a Committee of Inspection was formed consisting of TR Hamzah, Equiticorp, USSB (Liquidator) and UOB Nominees), a body which is still in existence and ought to have been consulted. Considering that the process of winding up CCSB is obviously yet to be completed, we are in no doubt that both USSB and Equiticorp are interested and affected parties who have the requisite locus standi to be heard in the proceedings before the High Court and to prosecute their respective appeals. B C

[23] We must, therefore, reject this preliminary objection. D

Non-appealable

[24] The second objection concerns the application of the Federal Court decision in *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713. This decision is said to support the proposition that directions of the winding up court made pursuant to s 237(3) of the Companies Act 1965 are non-appealable. By the doctrine of stare decisis, this court is bound to follow that decision and must necessarily dismiss both appeals. E

[25] With respect, we disagree. Not only do we find that to be an erroneous reading and understanding of the decision in *Ooi*, we find that the 'directions' or orders sought in this appeal were in fact and for all intents and purposes, not in the true nature of directions of advice and guidance. It is in the form of final orders, affecting substantive rights of the affected parties, a position which is quite different from the directions sought and granted in *Ooi*. A careful appreciation of the factual matrix and circumstances in that Federal Court decision will readily yield this understanding and conclusion. F G

[26] In *Ooi*, the facts were these. There were two main applications before the winding up court: H

(a) application by the majority contributories of Kian Joo Holdings Sdn Bhd (KJH), the company in liquidation, for leave to proceed with legal proceedings against the liquidators for alleged misconduct in a tender of the assets and eventual award to a company called Can-One International Sdn Bhd (Can-One); and I

(b) application by the liquidators for directions as to whether to complete the sale to Can-One.

A **[27]** KJH, the wound up company, had two factions of contributories led by two family members, the respondent majority with 52% in value of the total issued and paid up share capital, the other with 48%. KJH owned 34.46% of a company known as Kian Joo Can Factory Bhd (KJCFB shares). At meetings of the contributories, the two factions offered two differing views on the B method of distributing assets with one favouring the sale of the KJCFB shares whilst the minority preferred a distribution in specie of those shares. Those views carried into vote with the liquidators deciding to sell. The minority contributories launched an unsuccessful challenge to revise that decision in court.

C

[28] The liquidators then proceeded with the sale which unfortunately was aborted causing the liquidators to convene yet another meeting of the contributories.

D

[29] The majority contributories voted in favour of the sale of the KJCFB shares and once again, another sale was conducted, this time by open public tender. Expressions of interest were received which led to offers and improved offers before the liquidators finally accepted the offer by a company called E Can-One. The parties who participated in the sale included the respondent in the appeal. He was the family member leading the majority faction. His offer, made through his private vehicle, Gold Pomelo was consequently rejected by the liquidators.

F **[30]** The liquidators then informed the contributories of the award to Can-One. The sale was objected by both the minority and majority contributories. The majority contributories alleged that the acceptance of Can-One's offer by the liquidators was tainted with fraud and corrupt practice and consequently illegal, null and void. The liquidators denied the allegations.

G

[31] The liquidators then convened another meeting of the contributories to formally determine their views on the sale to Can-One, whether such a sale should proceed. At the meeting, all the contributories voted to abort the sale to Can-One.

H

[32] What followed was the filing of a civil action and multiple notices of motions before the winding up court by the various parties involved in or related to the sale of the KJCFB shares. The majority contributories commenced Civil Suit No D-22–505 of 2009 against the liquidators, alleging I fraud and corrupt practice. They also filed motions seeking, inter alia, an order to remove the liquidators, and an order that the majority contributories be granted leave to proceed with their civil suit which was commenced without the requisite leave (encl 476). The minority contributories, on the other hand, applied to strike out the majority contributories' application for leave

(encl 497) whilst Gold Pomelo filed a motion to set aside Can-One's bid at RM1.65 per share and to secure the sale at the price of RM1.55 per share (encl 506).

[33] It was against this factual backdrop that the liquidators invoked s 237(3) of the Companies Act 1965, seeking the court's directions as to whether to proceed with the sale to Can-One (encl 485). Can-One, the successful bidder applied to intervene in all the motions, taking the position of opposition of both Gold Pomelo and the majority contributories' motions.

[34] The liquidator's motion for directions under s 237(3) was allowed by the High Court. The remaining motions were dismissed.

[35] The Court of Appeal allowed all the appeals save for the appeal by Gold Pomelo. The decision was reversed on appeal to the Federal Court.

[36] At the Court of Appeal, the liquidators raised a preliminary issue on the appealability of the High Court's decision on encl 485. The preliminary objection was overruled but on appeal to the Federal Court, it was allowed. According to the Federal Court, 'the direction or advice given under s 237(3) of the Act is not a judgment or order'. The decisions of *Re Sportsman's Leisure & Hobby Warehouse Pty Ltd (in liq)* (1989) 7 ACLC 1270, *Re Blackbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 14, *Re Security Provident Fund Ltd (in liq); Rodger v Gourlay* (1984) 2 ACLC 594 and *Re JW Murphy & PC Allen* (1996) ACSR 569 were cited by the Federal Court in support of its conclusion.

[37] Before us, it is the submission of learned counsel for UOB Nominees that the directions given by the High Court were pursuant to s 237(3) of the Companies Act 1965 as the liquidators needed to complete the winding up of USSB (City Centre) and had thus sought the directions of the court as to whom he should pay the Surplus Funds. USSB was wound up 18 years ago and the liquidation process ought to have been completed save for this issue of who should receive the surplus funds. The directions given were to assist the liquidators expedite the winding up process and by the decision in *Ooi*, which is binding on the Court of Appeal, such directions are non-appealable; in which case the appeals ought to be dismissed in limine.

[38] On the strength of this pronouncement by the Federal Court, learned counsel for UOB Nominees submitted that this court has no jurisdiction to hear the present appeals. As we had mentioned earlier, with respect, that is not the correct reading of *Ooi*.

[39] The deliberations of the Federal Court on this issue run from paras 48–55 of the judgment, and the concerns of UOB Nominees really stem from the remarks made at paras 52–55:

> [52] It is also our considered view that the Court of Appeal erred in failing to find that *the directions given by the learned judicial commissioner under s 237(3) of the Act were in the nature of advice* and is accordingly not a judgment or order within the scope of s 67(1) of the Courts of Judicature Act 1964 ('the CJA 1964') and are thereby non-appealable. An appeal to the Court of Appeal only lies from a judgment or order within s 67(1) of the CJA 1964 which provides:
>
> > The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter.
>
> [53] We are of the view a direction or advice given under s 237(3) of the Act is not a judgment or order. In *Re Sportsman's Leisure & Hobby Warehouse Pty Ltd (in liq)* (1989) 7 ACLC 1270, the court in considering the nature of application for directions under s 379(3) of the Companies (Queensland) Code which is similar to our s 237(3) of the Act held at p 1273 that a direction given under similar provisions is not a 'judgment' or 'order'. The court followed *Re Blackbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 14 wherein it was held:
>
> > That sub-s (s 237(3)) does not, in my opinion enable the court to make binding orders on persons in the nature of judgments. The directions which a court may give on an application under it are more like the directions or advice which may be given under s 45 of the Trustees and the Executors Acts. Such directions are not in my opinion, subject to appeal. (*Re Tooth's Trusts* [1877] 5 QSCR 10). I have set out these views on s 237(3) because it was contended that the decision of WB Campbell J created an estoppels between the parties. But there was no judgment and no order. In my opinion there was no estoppels. Nor was there any right of appeal.

[40] According to the Federal Court, the rationale or the purpose of s 237(3):

> ... is to enable a liquidator both to obtain advice and to protect his position as to personal liability in the administration of the winding up. This reasoning has been followed in several Australian decisions. In *Re Security Provident Fund Ltd (in liq); Rodger v Gourlay* (1984) 2 ACLC 594 at p 595 the Australian Supreme Court ruled that:
>
> > The major matter is that the question asked in the summons (or at least questions 1 and 2) are outside the scope of liquidators' summons for directions. It is clear, upon authority, that sub-s 379(3) does not enable the court to make binding orders in the nature of judgment.
> >
> > The function of a liquidators' summons for directions is to give him advice as to his proper course of action in the liquidation; ...
>
> In *Re JW Murphy & PC Allen* (1996) ACSR 569, the Supreme Court of New South Wales held at p 570:

> an application for directions under s 379(3) of the Companies Code (or s 479(3) of the Corporation Law) is an administrative non-adversary proceeding, and a direction given pursuant to that section has no effect on the substantive rights of persons external to the winding up.
>
> [55] As *encl 485* direction is only an administrative proceeding by way of advice, any direction given is not a judgment or order and therefore does not fall within s 67 of the CJA 1964. It is our judgment therefore that the directions given by the learned judicial commissioner in *encl 485* are non-appealable.

[41] We have read and re-read the above parts as well as the rest of the Federal Court judgment with much care; and we make the following conclusions.

[42] First, the Federal Court was careful to point out that its decision was in relation to 'encl 485', that the 'encl 485 direction is only an administrative proceeding by way of advice' and that 'encl 485 is non-appealable'. This careful use or choice of words and phrases by the Federal Court is, in our opinion, deliberate and it indicates that it cannot be assumed that the view of the Federal Court is of general application, that every application invoking s 237(3) of the Companies Act 1965 is always non-appealable. This cautionary approach by the Federal Court, in our view, strongly suggests that each application must be examined in order to determine its true intent and purpose, before s 237(3) may be said to properly apply, as it was intended to apply. In fact, the Supreme Court of South Australia in *Re TTC (SA) Pty Ltd (in liq) (formerly Tom the Cheap (SA) Pty Ltd* (1983) 7 ACLR 784, citing *Re Blackbird Pies (Management) Pty Ltd (No 2)*, acknowledged the 'usefulness of the s 237 procedure is qualified by the consideration that a direction given on such an application does not amount to a judicial determination raising an estoppel'. The court there had also held:

> The question whether a court ought to determine an application by way of directions, where substantive rights of other parties are involved and where facts might be in issue requires the exercise of a discretion. The court should not deprive a potential litigant of his rights without giving him the opportunity of a full and adequate hearing, especially if he requires it. One way of making such a request is by the institution of appropriate proceedings by writ.

[43] It therefore, makes good sense to examine the contents of encl 485 in that appeal, as may be discerned from the grounds. At para 6(40), where the background facts are set out, it is stated that:

> (40) on 5 May 2009 the liquidators filed an application of directions under s 237(3) of the Act *seeking the court's directions as to whether to proceed with the sale of the KJCFB shares to Can-One* (encl 485); (Emphasis added.)

[44] The above shows that the liquidators in *Ooi* were looking to the court

for some advice or directions on an existing sale of shares to Can-One, whether they should proceed and complete that sale. The reason behind their approach to court is extremely important. The backdrop against which the sale of the KJCFB shares was being undertaken and the multiple litigations then ongoing, including a writ action against the liquidators themselves on their very decisions in relation to the sale of the KJCFB shares provide cogent and real concerns on the liquidators' part to approach the court for directions, advice and guidance.

[45] This is borne out by para 48 of the judgment where the Federal Court, inter alia, pointed out that the liquidators' application sought the ourt's directions 'as to whether the liquidators ought to follow the wishes of the contributories and to abort the completion of the Can-One agreement; or complete the sale as the termination of the sale would seem to be unfair to Can-One'. The Federal Court was of the considered view that 'these are directions bona fide requested for by the liquidators'; that the High Court was 'in no doubt when it held that 'this is precisely the sort of case in which such guidance and directions should be afforded' — para 49.

[46] At para 50, the Federal Court went on to opine that:

> *Where there are conflicting duties of the liquidator, which places the liquidators in an intolerable position, in our view the proper way is to obtain the directions of the court* (see the case of *Re Statewide Investments Ltd (in liq)* (1981) 6 ACLR 265). Whatever decision to be made by the liquidators whether to proceed or not with the sale will be criticized by the contributories or Can-One. *It is proper for the court to give directions where the liquidators' proposed decision is being criticised or when they, the liquidators have been confronted with charges of acting unreasonably* (see the case of *Sanderson v Classic Car Insurances Pty Ltd* (1986) 4 ACLR 114). Given the filing of the 505 Suit against the liquidators in relation to the sale, it is proper for the liquidators to inform the court and to take directions. (Emphasis added.)

[47] The existence and positions taken by the various parties in that appeal was not in dispute, given that the parties were already warring in court with their individual applications. And, this brings us to our second observation.

[48] In that appeal, the decision of the Federal Court was very much driven or dictated by the particular facts and circumstances in the appeal. This was repeatedly mentioned by the Federal Court.

[49] At para 51, the Federal Court went on to state what we see, are further material and relevant observations, that the liquidators' request to the court for directions:

> ... must also be viewed against the factual matrix of the case whereby for 15 years after the company was wound up, *the liquidators have been impeded from completing*

the winding up of the company by proceedings commenced by the contributories. This cannot go on forever and the liquidators are desirous of obtaining court's directions in respect of the completion of the liquidation. It must be stated here that the liquidators are under a statutory duty to bring the winding up of the company to an early conclusion and this is an important policy consideration behind the winding up provisions. On this point in *Re House Property and Investment Co Ltd* [1954] Ch 567 at p 612 it was held:

> ... the policy of the Act as expressed in [sic] s 302, carries the implication that he has to deal with the liabilities within a reasonable time. [sic] I imply those words in [sic] s 302 from the general policy of the Act. Parliament cannot have contemplated for 999 years. (Emphasis added.)

[50] The factual matrix of the case which included the fact that the winding up process had been ongoing for a considerable period, that the liquidators had been impeded from completing the winding up of the company, that such impediment was due to ongoing litigation, and the fact that the liquidators themselves had been sued by the majority contributories, were very real concerns that directly impacted on the eventual outcome of the appeal. The Federal Court said in no uncertain terms that '(T)his cannot go on forever'. Against those factual circumstances, the Federal Court felt that the liquidators needed to obtain the advice of the court as to what was to be done and more importantly, to be protected as to personal liability in the administration of the winding up.

[51] None of those circumstances presented in *Ooi*, save perhaps the duration of the winding up process, pertain in our instant appeals. The length of time taken is actually not an issue between the parties before us, and this could be explained by the time-consuming sale of the sole but substantial asset as in the 16 parcels of land. Those assets were finally sold on 12 May 2017 for approximately RM516m to Malola Garden City Sdn Bhd. The purchase price had been paid and at the time of the application, the sale was pending completion which 'will occur upon the successful transfer of the title to the Lands to Malola'. Unlike the liquidators in *Ooi* who had been sued by the involved parties and who were looking to court for directions to complete the sale, the liquidators in these appeals have already completed the sale.

[52] What must not be overlooked is the fact that in *Ooi*, the winding up court was not approached for directions on substantive issues of rights or liabilities of any of the parties, including those of Can-One. The winding up court was approached on what the liquidators must now do with the sale of the assets to Can-One, to complete the deal or otherwise after the liquidators had explained the factual situation. That direction sought is clearly on an administrative matter with the winding up court not being asked to make any pronouncement or determination of any right(s), especially bearing substantial

A and final elements, of any of the parties. That is entirely different from the factual matrix in these appeals.

B **[53]** When the case authorities referred to and relied on by the Federal Court in *Ooi* are examined, our concerns and considerations are further fortified. One of the cases cited by the Federal Court is *Re Security Provident Fund Ltd (in liq)*. In that decision, it is quite evident that the Supreme Court of the Australian Capital Territory had first asked itself whether the questions posed by the liquidator were within the scope of directions envisaged under their equivalent s 379(3) bearing in mind that that provision does not enable the court to make binding orders, but to give guidance and advice. After answering that question, the Supreme Court proceeded to dismiss the application for directions after finding the 'motion procedurally misconceived' and the directions sought *outside* the scope of s 379(3), that the directions required the court to 'determine finally the rights and liabilities of the company and of the mortgagor rising out of the mortgage'. In dismissing the application, the court held that:

> *However much the parties to this application may be in agreement that the determination of these questions on this summons would be convenient, the court should not so determine them, because such a determination might indirectly affect the rights of the company's creditors*, whom the liquidator represents. In principle, the liquidator must assert the rights of the company by a procedure which is capable of determining them fully and finally. Any decision of the court on the questions asked in this summons might well not be binding on either the liquidator or the mortgagor; and it might well be improper for the liquidator to undertake to be bound by the court's decision. Suppose that creditors were dissatisfied with the court's decision, and were advised that it was incorrect: it is at least doubtful whether any appeal would lie: *Re Blackbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 14. (Emphasis added.)

[54] Thus, the issue of the correctness of adopting the procedure under s 379(3) and in our instance, s 237(3) is a necessary and valid threshold question that must first be surmounted before an appeal can be said to be improperly brought over the directions given at the High Court. It is, therefore, in that sense and for those reasons that the Supreme Court in *Re Security Provident Fund Ltd (in liq)* had made the remarks cited by the Federal Court in *Ooi*.

[55] Dealing next with the decision of *Re JW Murphy & PC Allen*. This is actually one of two decisions by McLelland CJ of the Supreme Court of New South Wales, the other being his earlier decision in *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 5 ACSR 673, a decision which we will examine and which His Lordship also cited in *Re JW Murphy*.

[56] Once again, the Federal Court's adoption of McLelland CJ's remarks made in *Re JW Murphy* must be properly understood. In *Re JW Murphy*, there were two applications before the court; one was a motion filed in the winding up proceedings by the liquidators for directions under s 379(3) of the Companies (NSW) Code; the other initiated by the trustees of Meridian Investment Trusts for the opinion, advice or direction of the court under s 63 of the Trustee Act 1925 (NSW) by way of a summons in separate proceedings. Both applications concerned an agreement between BPTC, the wound up company, the liquidators and the trustees on a proposed deed for the assignments of certain choses in action by BPTC to the trustees. McLelland CJ noted that both s 379(3) of the Companies Code and s 63 of the Trustee Act are 'essentially concerned with future action by a liquidator or a trustee, as the case may be. Typically, under either provision the court would give a direction to the effect that the applicant, as such liquidator or trustee as the case may be, would be justified in acting in a specified way or on a specified basis. Frequently however, it is convenient for the liquidator or trustee first to enter into (or in the case of a liquidator to cause the company to enter into) a transaction in respect of which the court's sanction is desired, which is expressed to be conditional upon the court making an order or direction in order to satisfy the condition ...'.

[57] It is thus, our respectful view that McLelland CJ's remarks in *Re JW Murphy* to the effect that 'an application for directions under s 379(3) of the Companies Code (or s 479(3) of the Corporation Law) is an administrative non-adversary proceeding, and a direction given pursuant to that section has no effect on the substantive rights of persons external to the winding up', were more of a reminder. In *JW Murphy*, the court was dealing with the position of third parties who were external to the winding up but where the directions sought may affect their rights adversely. It was in that context that McLelland CJ warned of 'the limited effect of such a direction', as His Lordship had himself explained earlier in *Re GB Nathan*.

[58] In *Re GB Nathan*, the liquidator had sought directions under s 479(3) of the Corporations Law (equivalent to our s 237(3)) on two matters:

1. whether he was entitled or bound to deal with certain moneys and securities as being held on trust by the wound up company for certain of its clients or as available for unsecured creditors; and

2. whether he was entitled to deduct from those monies the costs, charges and expenses of the winding up.

[59] After tracing the historical antecedents of the provision, McLelland J held:

A Modern Australian authority confirms the view that s 479(3) 'does not enable the court to make binding orders in the nature of judgments' and that the function of a liquidator's application for directions 'is to give him advice as to his proper course of action in the liquidation; it is not to determine the rights and liabilities arising from the company's transactions before the liquidation' ... It seems well settled in B law that in an application under s 16 of the Act *a court must confine itself, in giving directions, to matters concerning administration of the estate and has no authority to resolve substantive matters in dispute between a trustee and a third party*. (Emphasis added.)

C **[60]** His Lordship further observed that:

... there are instances where a court has, in proceedings commenced as a liquidator's application for directions, gone on to make orders declaratory of substantive rights, clearly intended to be of binding effect on the parties to the proceedings and where necessary has made representative orders for this purpose: see for example *Re Staff* D *Benefits Pty Ltd (in liq)* (1979) 4 ACLR 54; ...

[61] Where the court makes orders which are declaratory of substantive rights having thus a binding effect on the parties to the proceedings, His Lordship opined that in such situations:

E The procedures of the court are sufficiently flexible to enable proceedings commenced as an application for directions to be changed into proceedings for the determination of substantive rights, and this is sometimes a convenient course in order to avoid the need to commence further proceedings involving additional cost and delay: see for example *Anmi Pty Ltd v Williams* (1981) 2 NSWLR 138 at p F 156-7 ...

[62] In other words, the court will then invoke some other procedural options in order that the matter or issue may be properly entertained and dealt G with as the mechanism under their s 479(3) or our s 237(3) is simply not suited for such administrative purpose.

[63] On the question of whether the directions made are appealable, His Lordship was careful to add:

H I should add that it does not necessarily follow that there is no appeal from an order of the court made on a liquidator's application for directions, although there are statements to this effect in some of the Australian cases commencing with the decision of Hanger J in *Re Blackbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 14. The availability of an appeal in any particular case must depend upon the I legislative provisions and rules regarding appeals in the particular court ...

[64] Yet another decision relied on in *Ooi* was the decision in *Re Sportsman's Leisure & Hobby Warehouse Pty Ltd (in liq)*. As was the case in *Re Security Provident Fund Ltd (in liq)*, Cooper J similarly declined to make the direction

sought or any other direction and proceeded to dismiss the application made under s 379(3) of the Companies (Queensland) Code. In *Re Sportsman's*, the wound up company was indebted for unremitted group tax. The Commissioner of Taxation claimed the amount owed from the liquidators relying on s 221P of the Income Tax Assessment Act 1936. The liquidators sought directions under s 379(3) that they distribute funds currently held by them in accordance with the order of priority set out in s 441 of the Companies (Queensland) Code.

[65] The Commissioner of Taxation was of the view that the proceedings initiated by the liquidators were inappropriate to resolve the issues under s 221P in respect of unpaid group tax. The Commissioner had not only initiated separate proceedings to raise these matters but had also indicated that he did not consider himself bound by any direction made and subsequently withdrew from the s 379(3) proceedings. The liquidators who continued with the proceedings submitted that in the event of a favourable decision, they intended to plead in the proceedings commenced by the Commissioner, an issue estoppel arising out of the s 379(3) proceedings and the decision given. A preliminary question then arose as to whether a direction given under s 379(3) bound the parties to their substantive rights or was appealable.

[66] Quoting from *McPherson, The Law of Company Liquidation* (3rd Ed) O'Donovan (1987) and the decision of *In re Grose (decd)* [1949] SASR 55, Cooper J said:

> The purpose of the section is to enable a liquidator both to obtain advice and to protect his position as to personal liability in the administration of the winding up. However, the protection, if the analogous position of a trustee seeking advice and direction of the court is to apply, is not absolute. The protection will only be available when all material and relevant facts are substantially as submitted on the application. It there are omitted circumstances that are relevant, which if proved would have altered the advice or direction given, the order may be no defence to the trustee.
>
> In my opinion, the weight of authority in Australia, and in this Court, is against the proposition that a direction given under sec 379(3) binds the parties as to their substantive rights or is appealable. To the extent that such a direction has any binding force it is limited to the protection of the liquidator, in undertaking the winding up, from actions for breach of duty. There is no jurisdiction under sec 379(3) of the Code to release a liquidator from a statutory duty to pay under sec 221P of the Act, nor to render ineffective the Commissioner's statutory right to recover from the applicants unremitted group tax if, in such recovery proceedings, the court determines that the advice given was incorrect.
>
> The Commissioner has, by his counsel, indicated that he will not be bound by any direction I may make on the substantive issues raised. In consequence I do not consider that it is appropriate that I should give any advice on the issue. In coming to this decision, I am also influenced by a concern that, notwithstanding that the

application for directions as to the distribution of the funds in accordance with the priorities set out in sec 441 of the Code, the underlying issues are not particular matters arising under the winding up for the purposes of sec 379(3) of the Code. The obligations of the liquidators, if any, arise under the provisions of sec 221P of the Act and not under the Code.

[67] Cooper J was of the opinion that the question of the liquidator's liability under s 221P of the Act stands outside the administration of the winding up under the Code, and for that, the liquidator ought to institute separate proceedings against the Commissioner of Taxation. In the circumstances, the court declined to give directions and the application was dismissed.

[68] As seen from the above, on each occasion when the particular court in Australia was approached for directions under their equivalent s 237(3), the court always asked itself first whether it was a suitable or appropriate case in which to give directions. That question must be asked as the court maintains overall supervisory function and role in the liquidation regime, that in administrative matters arising in the course of the liquidation, directions and advice of the court may have to be sought. It is then 'only in his role as the Court's officer to protect the interests of the creditors as a whole that the liquidator is given the special right conferred by s 379 of the Code' — see *Sanderson v Classic Car Insurances Pty Ltd*.

[69] Four other decisions considered in *Ooi* are *Blackbird Pies (Management) Pty Ltd (No 2)*, *Re Statewide Investments Ltd (in liq)*, *Re Tooth's Trusts* and *Re House Property and Investment Co Ltd*. The decision in *Re Tooth's Trusts* was referred to actually for comparison purposes on the position of trustees handling estates of the deceased and that of liquidator; while *Re House Property and Investment Co Ltd* at p 612 was cited for its general observations on the length of time taken to complete the winding up of a company. In that same decision however, Roxburgh J had said that '... a liquidator is *not to distribute* the property among the members *before he has dealt with the liabilities*'. We see that in the present appeals, the liquidators had asked for forwarding of and the application of the surplus funds even before the liabilities had been dealt with.

[70] As for the decision in *Re Blackbird Pies (Management) Pty Ltd (No 2)*, when that decision is carefully examined, it will be seen that the remarks on the non-appealable nature of the decision was due to the fact that there was in fact no order given in the first place; that only 'advice' was given. The liquidator there had sought directions and advice of the court under s 237(3) of the Companies Act 1961 on the issue of whether the proceeds of a sale of certain plant and equipment entered before the company was wound up but which were sold by the liquidator after the company was wound up, were the property of the wound up company. That summons was heard by WB Campbell J and

on the material before the court, it was 'advised that the proceeds of sale were the property of Blackbird Pies (Management) Pty Ltd'. The bank that had bought the equipment contended otherwise, that it was entitled to the proceeds and sought leave of court to proceed to recover the proceeds.

[71] It was against that backdrop that Hanger J had to consider the position of an earlier 'decision' made by Campbell J on a summons initiated by the liquidator under s 237(3) of the Companies Act 1961 where WB Campbell J had: '... concluded his opinion as follows: 'On the material before me I *advise* the liquidator etc'.

[72] According to Hanger J:

> The only order he made was as to costs and this was done with the agreement of the parties.
>
> I have set out these views on s 237(3) because it was contended that the decision of WB Campbell J created an estoppel between the parties. But there was no judgment and no order. In my opinion, there was no estoppel. Nor was there any right of appeal.

[73] When the liquidator opposed the bank's request to be heard again, that it should not be given a second chance; this is what Hanger J said after looking at s 230(3) on the application for leave to commence proceedings against the wound up company, which was the application before Hanger J:

> I do not think that the appearance of the Bank on the Summons for directions and the giving of advice by the learned Judge on the hearing of the summons should debar the Bank from taking steps to assert its rights. It may well be that the Bank could take other steps to secure a judicial determination of its claim. But the liquidator has not suggested that it could nor urged this as a reason why the Bank should not be allowed to bring an action. In plain fact, there has been no judicial determination of the Bank's claim and I think it is entitled to obtain a determination and, and if it so wishes, to appeal. I therefore propose to give the Bank leave to proceed against the company.

[74] Consequently, the decision in *Blackbird Pies (Management) Pty Ltd (No 2)* is no authority for the proposition that a decision in s 237(3) is never appealable. Evidently, in that case, Campbell J had only given 'advice', and had made no order save on costs and even then, it was upon agreement of the parties.

[75] In *Re Statewide Investments Ltd (in liq)*, the liquidators applied for directions that they, on behalf of the company, be at liberty to enter into a proposed contract to sell land which was subject to a mortgage on which was owed. Under the terms of the proposed contract there would be considerable

benefits including higher dividends to the company and its creditors; not proceeding with the proposed contract meant that the land would be sold at a considerably lower price which would not only be insufficient to pay off the mortgage debt but would reduce the dividend to the ordinary unsecured creditors of the company. The court had acceded to the liquidator's contention that the 'commercial prudence of the proposed transaction, apart from the winding up situation in which the company is now placed, was beyond doubt and that the application did not in fact seek that the court should pronounce upon the commercial viability of the transaction. Rather … the *liquidators are merely asking that the court gives directions that they be at liberty to enter into such a contract* …'. It was under those circumstances and for those reasons that the directions were given.

[76] We are, therefore, of the view that the court necessarily has to ask itself whether s 237(3) has been properly, suitably or appropriately invoked before proceeding to consider the application on its terms. Section 237(3) is not available nor is it suitable for applications under the guise of directions for general administration when the pith and substance of the application is to decide substantive questions as against persons making proprietary claims adverse to the assets of the wound up company.

[77] As we will explain, the significant differences in circumstances in our present appeals from those in *Ooi* are material and relevant to the issue of whether the liquidators' application for directions were properly initiated in the first place; and that really is the necessary question for determination. Such a question is valid and was in fact the very question that vexed the Federal Court in *Ooi*. Had it been a simple case of non-appealability of s 237(3) of the Companies Act 1965, which issue ordinarily would have been decisive of the appeal on encl 485 without more; that would have been immediately apparent from the reasoned grounds of the Federal Court. But that was clearly not the case.

[78] Before any court is divested of jurisdiction and competence to hear any matter including an appeal (on the basis that the matter is not appealable), the court will and should always first examine the propriety of the matter or appeal. It is only where the matter or appeal is not properly within the ambit of the relevant law or bona fides is not established that the submission of lack of competency is condescended to. This approach is evident in *Ooi* itself where the Federal Court set about examining first the factual matrix and circumstances in order to deal with the issue of bona fides and propriety or correctness of the application under s 237(3) before dealing with the matter of jurisdiction and competency of the appeal. It was only after it was satisfied that the application was bona fides (para 49) and proper (para 50) that the Federal

Court considered and agreed with the issue of the non-appealability of the directions sought.

[79] This approach is consistent with the line of case authorities of *Teng Chang Khim (appealing as speaker of Selangor State Legislative Assembly) v Badrul Hisham bin Abdullah & Anor* [2017] 5 MLJ 567; [2017] 9 CLJ 630 and the related cases dealing with the issue of justiciability of parliamentary privilege; and even the Federal Court decisions in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 3 CLJ 123. The court always consider the question of whether the matter is correctly or properly within the ambit of the relevant provision, before considering the question of want of jurisdiction or competency. This is regardless whether there are clear provisions to limit or bar the jurisdiction of the court within the relevant law under review (as was the case with *Teng Chang Khim* and *Semenyih Jaya Sdn Bhd*), or is the result of judge-made pronouncements as is the position in *Ooi*.

[80] Taking therefore the same approach as the Federal Court and in considering whether the application was properly and correctly initiated, it is necessary to ask what then were the circumstances or reasons for the liquidators' application in the present appeals. In the notice of motion, the liquidators cited the following grounds:

(a) there is a dispute between UOB Nominees and the liquidator of USSB as to who is the rightful contributory of the respondent for the purpose of distributing the surplus funds and, as a consequence, how the surplus funds are to be dealt with; and

(b) the issue as to who is the rightful contributory of the respondent for the purpose of distribution is a legal issue which requires guidance and directions from this honourable court. The liquidators of the respondent are unable to resolve this legal issue.

[81] In the affidavit filed in support, the liquidators elaborated on the above grounds. According to the liquidators, whilst steps were being taken to dispose of the lands, 'there was in the background an existing dispute' between UOB Nominees and the liquidator of USSB 'as to who is the rightful contributory of the respondent for the purpose of distribution and, as a consequence, how and to whom the surplus or remaining proceeds from the sale of the Lands, after settlement of the respondent's debts as owed to its unsecured creditors plus any lawful outgoings such as any liquidation costs and expenses (surplus funds), should be made'.

[82] The liquidators referred to the exchange of correspondence between the various parties' solicitors and the liquidators, and the respective claims of UOB Nominees and USSB:

> UOB Nominees
>
> 12. ... UOB Nominees claim that all shares in the Respondent were transferred to and subsequently registered in its name as security for a loan taken by USSB from Overseas Union Bank Limited (now known as United Overseas Bank Limited) (UOB).
>
> 13. ... also claim that the issue as to who is the contributory of the Respondent has already been decided by the Court of Appeal in the case of *North Plaza Sdn Bhd v United Securities Sdn Bhd* [2010] 1 MLJ 631; [2010] 1 CLJ 470 and by this Honourable Court in an unreported judgment.'
>
> 14. In the upshot, UOB Nominees have requested that the Liquidators of the Respondent forward the Surplus Funds to UOB Nominees to allow UOB Nominees to apply the Surplus Funds based on its legal entitlement under the relevant security documents and thereafter remit the surplus thereof (if any) to the Liquidator of USSB.
>
> USSB
>
> 15. USSB is a creditor of the Respondent. The Respondent was a wholly owned subsidiary of USSB.
>
> 16. Based on the exchange of correspondences set out in paragraph 11 above, the Liquidator of USSB claims that the debts incurred by UOB Nominees/UOB were at USSB's level. In this regard, the Liquidator of USSB is of the view that no distribution of the Surplus Funds could be made prior to UOB Nominees / UOB submitting their proof of debt to the Liquidator of USSB for adjudication. The Liquidator of USSB is of the added view that UOB Nominees/UOB hold the shares in the Respondent as security and not as beneficial shareholder.

[83] The liquidators deposed in their affidavit that:

(a) they were unable to seek the directions of the Committee of Inspection because three out of four members will have to abstain from voting due to a conflict of interest;

(b) their solicitors had advised them that the issue of who is the rightful contributory for the purpose of distribution is not a commercial decision which they can make and is also not a matter which falls within their discretion;

(c) their solicitors had advised them that the issue of who is the rightful contributory for the purpose of distribution is a legal issue which requires guidance and directions from the court; and

(d) their solicitors had advised them that in the event the liquidators decide on the dispute between UOB Nominees and USSB and thereby the

issue of who is the rightful contributory, their proposed decision will likely draw criticism from either of them as being unreasonable or evidence of bad faith, and unnecessarily expose them to potential suits for misfeasance, bias, breach of duty etc.

[84] It is in that context or factual matrix and for those reasons that the liquidators approached the court under s 237(3), informing the court that they 'are unable to decide on the dispute between UOB Nominees and USSB as to who is the rightful contributory of CCSB for the purpose of distribution and as a consequence, how the surplus funds should be dealt with'.

[85] USSB and Equiticorp contended before the High Court and also before us that s 237(3) of the Companies Act 1965 is not appropriate to determine those questions posed by the liquidators. This is because those questions impinge on substantive rights and liabilities of parties including those who were not before the court. Such parties being the creditors of USSB, in particular UOB Singapore, in relation to the loan agreement between USSB and UOB Singapore for the purchase of the CCSB shares. That being so, it was contended that the winding up court would not have all the facts and evidence required to adjudicate upon the issue posed.

[86] According to USSB and Equiticorp, there existed various unresolved issues on the loan agreement, which issues cannot be resolved using the s 237(3) route. Amongst the issues are:

(a) the rights and liabilities of the parties under the loan agreement at the holding level of USSB;

(b) UOB Singapore's right in enforcing its security on the charge on the CCSB shares;

(c) the effect of USSB's liquidation on the enforcement of the security;

(d) USSB's right of redemption;

(e) the disputed debt upon which UOB Singapore seeks repayment from the surplus funds; and

(f) the conduct of UOB Singapore in not enforcing its security or suing to recover payment upon 'default' in 1985.

[87] It was further contended that those questions determine with finality the entitlement to the surplus funds to be distributed by CCSB as the subsidiary in respect of a loan agreement transacted at the level of USSB, the holding company. Since s 237(3) is meant for advice and guidance of the winding up court and to protect the liquidators as to personal liability in the administration of the winding up, with the valid and genuine issues raised by

A USSB and Equiticorp, the winding up court ought to have declined jurisdiction.

[88] We agree with the submissions of learned counsel for USSB and Equiticorp. The purported 'directions' sought or posed by the liquidators are not administrative directions at all; quite unlike the situation in *Ooi* where under the circumstances already discussed above, the liquidators there needed directions on the proper course going forward in the administration of the liquidation. The directions sought, inter alia, concerned substantive rights of parties who were not even before the court; and as we have seen from the several Australian decisions cited by the Federal Court in *Ooi*, the s 237(3) mechanism or procedure is not suitable or appropriate for such purpose.

[89] The 'directions' sought by the liquidators in these appeals determined the issue of entitlement to assets which obviously include the surplus funds of the wound up company. This is apparent from the terms of the 'directions'; that UOB Nominees is to be determined and effectively declared as the 'sole and rightful contributory' of USSB not generally but for a specific purpose and that purpose is as set out at paragraph or direction (2). In the second direction, the winding up court is invited to give directions 'to allow UOB Nominees to apply the surplus funds based on its legal entitlement under the relevant security documents'. Such a reference obviously deals with the issue of the loan agreement and all its related matters and arguments, which, with respect, the present winding up court was not in the position to deal with. Such issues also concern legal and factual considerations of multiple parties at different levels and at various stages of their respective liquidation or receivership. Such issues or matters are not at all administrative matters and are quite clearly outside the scope and intent of s 237(3) as pronounced in *Ooi*.

[90] In our opinion, the matter of entitlement to the surplus funds is necessarily related to matters of substantive rights and liabilities of parties or entities including parties who were not before the winding up court. The directions sought were really orders which entitled and authorised UOB Nominees to use the surplus funds towards settling a debt owed not by CCSB, the wound up company which was before the winding up court but owed by USSB at the level of holding company; a company which was also wound up and which would require the determination of the winding up court in entirely separate proceedings. We further understand and can see that the debt owed at the level of USSB is very much in dispute for the reasons articulated by learned counsel for USSB. This is quite important as the High Court in these appeals proceeded to determine the matter of the debt between UOB Singapore and USSB, a determination which was clearly outside its remit.

[91] In our view, these matters ought to be dealt with in or through separate proceedings, initiated by the appropriate parties, whether UOB Nominees, USSB or Equiticorp or even UOB Singapore. Further, the directions effectively and for all intents and purposes amounted to and were determinations which were conclusive or final in relation to the issue of entitlement to the surplus funds, that party being UOB Singapore who is not before the winding up court, though benefiting from the direction and distribution. This is yet another important distinguishing factor with the directions sought in *Ooi* where there was no issue of conclusiveness or finality involved in the directions sought.

[92] We further agree with and share in the observations of McLelland J made in *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 5 ACSR 673, that 'cases may arise where practical consequences of the giving of directions could justify an appeal'; a decision followed in the case of *Coats v Southern Cross Airlines Holdings Ltd (in liq)* (1998) 16 ACLC 13933 where the Court of Appeal of Queensland found it inappropriate for the liquidators to seek the court's directions to give notice to contributories of potential claims they may have against the auditors and directors because legal rights or interests of other persons would be adversely affected.

[93] We certainly find the circumstances and the concerns of USSB and Equiticorp valid and justified in construing the 'directions' here are not in the true nature of directions seeking advice or guidance of or from the court on administrative matters as envisaged under s 237(3). The directions are final orders determinative of substantive rights of various parties. What further troubled us was the added fact that the 'surplus funds' had yet to crystallise at the time of consideration. This is clear from the first two questions posed, that the unsecured creditors were yet to be paid, that the outgoings in terms of costs and expenses incurred in relation to the liquidation were yet to be settled.

[94] For all these reasons, this preliminary objection is also without basis and is consequently dismissed.

Substantive merits of the appeals

[95] On the issue of the substantive merits of the appeals, having carefully considered the submissions of all parties, we agree with USSB and Equiticorp that the learned judge had plainly fallen into error in granting the application in the terms sought.

[96] Aside from our earlier observations about the status of the surplus funds, we are not in agreement with the learned judge that the 'directions' sought be granted. UOB Nominees had contended that as the registered

shareholder of the CCSB shares, the surplus funds should be forwarded to them, not for UOB Nominees to keep and do as it pleases, but 'to allow UOB Nominees to apply the surplus funds based on its legal entitlement under the relevant security documents'. The terms of this 'direction' inherently and indirectly acknowledges that the surplus funds is not paid to UOB Nominees but that it is paid to UOB Singapore. The order of the High Court allows the liquidators 'to be forwarded' to UOB Nominees but not paid out to them.

[97] We agree with USSB and Equiticorp that such a direction is somewhat 'peculiar' as it summarily yet effectively and finally determined the distribution of surplus funds or assets of CCSB to be paid to the creditor of USSB, that is, UOB Singapore, thereby settling the debt of USSB. And, it is material to note that USSB itself is in liquidation and UOB Singapore has not, at the material time, filed any proof of debt or taken any action to recover the debt due under the loan agreement.

[98] We further agree with USSB and Equiticorp that before any part of the surplus funds may be applied by UOB Nominees, there must be a proper determination of the 'legal entitlement under the relevant security documents', whether of UOB Nominees or UOB Singapore. The position of the loan agreement, the respective rights and liabilities of the involved parties, must be verified and ascertained first before the surplus funds or any part of it, may be applied towards repayment of any monies due under the loan agreement and the relevant security documents. That determination of 'legal entitlement under the relevant security documents' cannot be conducted at the level of the winding up court dealing with CCSB's liquidation, but by the liquidators of USSB and in the relevant winding up proceedings dealing with USSB's liquidation. Even if it may be argued that the present winding up Court can deal with that matter of entitlement, as was so determined by the High Court in the present appeals, it becomes apparent that the mechanism of s 237(3) is not the proper procedure due to its limited features and intent.

[99] In any event, with respect, we cannot agree with the determination of the learned judge that UOB Nominee is the sole and rightful contributory of CCSB, even for the purpose spelt out in the second direction sought. We say this with caution as we have just dismissed the preliminary objections of UOB nominee, concluding that s 237(3) was not properly invoked in the facts and circumstances of the present appeals; and we now appear to pronounce on the merits of the application.

[100] For the record, this exercise is really to further illustrate and drive home the point that we have made about the unsuitability of the s 237(3) procedure for the purpose(s) stated by the liquidators. We are mindful that the following observations are made without the benefit of certain parties before us,

especially UOB Singapore, to whom a portion of the surplus funds have already been paid but whose presence is vital on the determination of their substantive rights and obligations under the loan agreement and the related security documents in relation to USSB and CCSB.

[101] The issue before the court charged with the control of the liquidation of CCSB was whether UOB nominee is the sole and rightful contributory of CCSB for the purpose set out in the second direction. The nominee direction concerns the use of the surplus or remaining proceeds from the sale of CCSB's assets.

[102] It is important to appreciate that the proceeds are from the sale of CCSB's lands and the surplus funds comes about after CCSB's debts and lawful outgoings have been settled, something which is yet to materialise. What the liquidators sought to do was obtain the permission of the winding up court to forward the excess or surplus funds to UOB Nominees and specifically allow UOB Nominees to apply that surplus funds under the 'relevant security documents'; and if there is any surplus after that exercise, that surplus will then be remitted to the liquidators of USSB.

[103] The application required the winding up court to first determine whether UOB Nominees was a contributory within the meaning of s 4(1) of the Companies Act 1965. The learned judge had answered this poser in the affirmative holding:

(a) that it was not in dispute that USSB was in default under the loan agreement when it failed to repay the loan;

(b) UOB Nominees were the registered shareholders of the CCSB shares according to SSM searches and s 100(1) of the Companies Act;

(c) UOB Nominees was a 'contributory' under s 4(1) of the Companies Act and as held in the cases of *TR Hamzah & Yeang Sdn Bhd v City Centre Sdn Bhd* [2014] 1 CLJ 682 and *North Plaza Sdn Bhd v United Securities Sdn Bhd* [2010] 1 MLJ 631;

(d) by virtue of s 247(2) of the Companies Act, the court is entitled to 'adjust the rights of the contributories among themselves and distribute any surplus among the persons thereto'; and

(e) since USSB still owed UOB Singapore, UOB Nominees was entitled to use or apply the surplus funds towards settling the outstanding sums of USD106,023,407.08 as provided for under cl 4.2 of the debenture.

[104] Learned counsel for USSB and Equiticorp argued that the learned judge was erroneous in rendering that determination. According to learned counsel, UOB Nominees is not and cannot be construed as a contributory because it is

not liable to contribute to the assets of CCSB's assets. This is by reason of the terms of the loan agreement between UOB Singapore and USSB; and that the court decisions could be easily distinguished.

[105] Learned counsel for UOB Nominees contended otherwise; submitting that since the CCSB shares were registered in its name, and as confirmed by the SSM search that it is the sole shareholder, by reason of s 100(1) of the Companies Act and the decisions in *Lim Poh Choo v Absolute Ascend Sdn Bhd & Anor* [2008] 3 MLJ 740 and *Lin Shoon Jewellers Sdn Bhd v Kedai Emas Mee Chan Sdn Bhd* [2005] MLJU 586; [2006] 2 CLJ 644, UOB Nominees is the sole and rightful contributory. Consequently, the liquidators can only remit CCSB's surplus funds to its sole registered shareholder, namely UOB Nominees. Both USSB and Equiticorp are said to be devoid of basis to protest that payment.

[106] Learned counsel for UOB Nominees further relied on the following main pieces of evidence as supporting its claim as the sole contributory:

(a) minutes of meetings held on 16 February 2012, 13 March 2012 and 28 March 2012 as convened by the official receiver who was first appointed to manage the affairs of CCSB;

(b) official receiver's letter dated 24 September 2013 enclosing the list of creditors and contributories;

(c) appointment of UOB Nominees as a member of the Committee of Inspection (COI) on 23 December 2013 by virtue of it being the sole contributory as affirmed by the official receiver in its affidavit dated 13 November 2013; and the subsequent meeting of the COI where there was no protest on such appointment;

(d) court decisions in *TR Hamzah & Yeang Sdn Bhd v City Centre Sdn Bhd* [2014] 1 CLJ 682 and *North Plaza Sdn Bhd v United Securities Sdn Bhd* [2010] 1 MLJ 631; and

(e) having charged and thereafter registering the CCSB shares in the name of UOB Nominees, USSB had divested itself of all of its rights, title and interest to the shares; that it is no longer the shareholder of CCSB but UOB Nominees is.

[107] Following the conclusion that UOB Nominees is the sole and rightful contributory, the High Court had rightly adjusted 'the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto' pursuant to s 247(2) of the Companies Act.

[108] In these appeals, learned counsel for the liquidators informed the court that the liquidators had embarked on this course of action for the reasons set

out in the affidavit filed. They took the view that the issue of whether UOB Nominees is the sole and rightful contributory is a legal and not commercial question, that they needed guidance and protection from the court. From their affidavits, the liquidators had also indicated that there will be surplus funds available after attending to the costs, tax refunds, that such payment to UOB Nominees can be made.

[109] Section 4(1) of the Companies Act defines 'contributory' as follows:

> in relation to a company, means *a person liable to contribute to the assets of the company in the event of being wound up*, and includes the holder of fully paid up shares in the company and, prior to the final determination of the persons who are contributories, includes any person alleged to be a contributory. (Emphasis added.)

[110] From the terms of s 4(1), whether a person is or is not a contributory arises only in the event of a company being wound up. When this occurs, read with s 214 of the Companies Act, the definition avails a range of persons who the liquidators and the creditors can turn to for contributions to the assets of the wound up company in order that debts may be satisfied; or depending on context, who may petition for the winding up of the company.

[111] However, according to the authors, *McPherson's Law of Company Liquidation* (2nd Ed), p 600, discussing the equivalent s 79 to our s 4, the definition in s 79 is 'simply as an elliptical description of a contributory and one which, to make it complete, must be supplemented by reference to s 74'; the equivalent s 74 being our s 214:

> Considered in isolation, the definition in s 79 of a contributory as 'every person liable to contribute to the assets of a company in the event of its being wound up' is 'somewhat misleading: for it seems to suggest that persons are contributories if-and only if-they are, on winding up, actually bound to make payments into the funds of the company. But if this were the true criterion it would mean that a debtor to the company was, while a fully paid up shareholder was not, a contributory. In fact, the position is precisely the reverse; a holder of fully paid up shares is regarded as a contributory, and this was settled by the law at an early date. Nor has there ever been any doubt about the position of a mere debtor of the company:
>
> > He is bound to pay money, which moneys, when paid, will be part of the assets of the company, and in that sense he is liable to contribute to the assets, but that does not make him a contributory within the meaning of the Act.
>
> In short, the law recognises a definite distinction between, on the one hand, the status of contributory, and, on the other, liability to contribute to the assets. The former is virtually synonymous with membership of the company and may, it seems, exist prior to winding up; whereas the latter, though incidental to that status, is a liability which becomes enforceable, if at all, only when winding up commences. The process of interpretation by which result has been reached is somewhat peculiar. It involves treating the statement in s 79 not as a comprehensive definition

A but simply as an elliptical description of a contributory and one which, to make it complete, must be supplemented by reference to s 74. This section identifies the present and past members of the company as the persons who are liable to contribute to the assets and, though important qualifications are added, these qualifications are concerned solely with the extent of the liability imposed and do not affect the generality of the foregoing description ...

B

[112] Although UOB Nominees is the registered shareholder of the CCSB shares and such registration forms prima facie evidence of their title to the shares under s 100(1) of the Companies Act, their title to the shares is not the C issue. The real and proper question in these appeals is whether as registered shareholder, they are, without more, 'contributory' within the meaning of s 4(1). It is in that regard that the security documents and the loan agreement become relevant in determining that question.

D **[113]** Learned counsel for USSB and Equiticorp argued that under those documents, UOB Singapore and also UOB Nominees had carved themselves out of any liability or obligation to contribute towards the assets of USSB or even CCSB in the event of liquidation. The creation of the charge via the debenture was precisely to secure them that position. Consequently, UOB E Nominees is not a contributory within the meaning under s 4(1).

[114] We have examined the loan agreement and the debenture, the security documents concerned. Clauses 6, 7 and 12 of the loan agreement executed way back on 17 December 1982 as well as the recitals and cll 2, 3.1, 4 and 11 of the F debenture executed at the same time pursuant to the loan agreement are of particular relevance for this purpose. These terms show that the security for the loan was in the shares of CCSB and not in or against any other asset of CCSB, especially the lands.

G **[115]** Pursuant to cll 2 and 3.1 of the debenture, the charge over the CCSB shares were created and registered in the name of UOB Nominees:

2. CHARGE

H In pursuance of the Loan Agreement and in consideration of the premises the Borrower as beneficial owner hereby charges with payment to the Bank of the Loan, interest thereon and all other moneys under or pursuant to the Loan Agreement and the Security Documents (including all fees, charges, costs and expenses arising out of or in connection with the provisions of this Debenture):

I (a) by way of fixed charge all and singular the fixed property and assets of the Borrower whatsoever and wheresoever situate, both present and future, and in particular, without prejudice to the generality of the foregoing, all the CCB Shares now or hereafter owned or acquired by the Borrower; and ...

3. REGISTRATION OF CCB SHARES

3.1 All or any of the CCB Shares charged to the Bank hereunder shall be registered in the name of the Nominee and the Borrower will at its own cost and expense execute and do, or cause to be executed and done, all such transfers, assurances and things as may be necessary for assuring and vesting the full legal title to the CCB Shares or any of them to and in the name of the Nominee as aforesaid.

[116] Under cl 11 of the debenture, the bank had the right to enforce the security found in the CCSB shares:

11. POWER OF THE BANK IN THE EVENT OF DEFAULT

11.1 At any time after the Loan, interest thereon and all other moneys agreed to be paid under the Loan Agreement and the Security Documents shall have become payable under Clause 19 of the Loan Agreement, the Bank may exercise all or any of the following rights, powers or remedies, that is to say:-

(a) The Bank may sell or dispose of all or any of the CCB Shares in such manner for such consideration and on such terms as the Bank may think fit ...

[117] From these agreed terms, the creation of the charge does not deprive USSB of the right of redemption, that right is retained and exercisable upon payment of the redemption sum and cannot be ignored by UOB Singapore or even UOB Nominees — see also *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR (R) 1. In short, being registered shareholders of UOB Nominees pursuant to the debenture neither qualifies or equates to UOB Nominees as the holding company of CCSB. It remains shareholder due to the loan agreement and by virtue of the debenture.

[118] UOB Nominees had relied on the decision in *Enviroco Ltd v Farstad Supply A/S* [2011] 3 All ER 451; [2011] 2 BCLC 165 to support the proposition that once the CCSB shares had been transferred and registered in the name of UOB Nominees, USSB as the holding company, had lost all its rights in respect of CCSB, its subsidiary. With respect, we must disagree. The decision in *Enviroco Ltd v Farstad Supply A/S* was in respect of a mortgage and also under a different statutory regime which recognised rights over shares which are held under a debenture. There are particular provisions in our Companies Act which must be considered, amongst them being ss 5(3) and 113.

[119] Further, cl 8.2 of the debenture has provided for the right of redemption by USSB:

Clause 8.2

The Borrower hereby further declares that the powers and authorities conferred under the preceding sub-clause are given for valuable consideration and shall be and

remain irrevocable until payment and discharge of the whole of the Loan, interest thereon and all other moneys under the Loan Agreement and the Security Documents.

[120] This is also implicit in cl 4 of the debenture which at the same time, arguably qualifies UOB Singapore and UOB Nominees from being contributories not only within the meaning in s 4 of the Companies Act but also for the purpose of contributing 'an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up and for the adjustment of the rights of the contributories among themselves ...' as provided in s 214.

[121] Clause 4 of the debenture reads as follows:

> 4. DIVIDENDS AND ACCRETIONS
>
> 4.1 There shall be deemed to be included in the security hereby created and deemed to be part of all the moneys and liabilities hereby secured (a) all dividends paid or payable on or after the date hereof on the CCB Shares or any thereof and (b) all stock, shares, rights, moneys or property accruing or offered at any time by way of redemption, bonus, preference, option or otherwise to or in respect of all or any of the CCB Shares; *provided always that the Bank shall not incur any liability in respect of all calls, instalments or other payments*.
>
> 4.2 All dividends and other income paid or payable on the CCS Shares shall be paid to the Bank and may be applied at the Bank's discretion in or towards payment of the Loan, interest thereon and all other moneys due and payable under the Loan Agreement and the Security Documents. (Emphasis added.)

[122] It is not in dispute that following USSB's default, UOB Singapore had not enforced its rights, powers or remedies by selling or disposing of the CCSB shares. In fact, the amount outstanding to UOB Singapore is not settled and there are contentions of the debt being now time-barred. With USSB in liquidation, UOB Singapore had the option of either enforcing its security in the shares or proving its debt; both being not enviable options for the reasons suggested by USSB and Equiticorp and arguably placing UOB Singapore as an unsecured creditor ranking pari passu with all the other creditors of USSB. In fact, as held by the Federal Court in *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v Mbf Finance Bhd & Anor* [2005] 2 MLJ 201, those ought to be its options. In *K Balasubramaniam*, p 227, the Federal Court citing *Sanderson v Classic Car Insurances Pty Ltd* had indicated when s 237(3) may be properly invoked:

> ... At p 116 of the report, Young had this to say: 'Although s 379(3) of the Companies Code is expressed in wide terms, it seems clear that it does not permit the liquidator or a provisional liquidator to come to court whenever he feels some unease about a situation and wishes to obtain some sort of insurance against the

possibility of error as well as an assurance that he is on the right track'. That Australian case also listed the following four classes of cases where s 379(3) is applicable:

(a) guidance to the liquidator on matters of law; see eg *Re Australian Home Finance Pty Ltd* [1956] VLR 1 and; *Re Standard Insurance Co Ltd* [1963] 80 WN (NSW) 1355;

(b) questions involving legal procedure (eg whether a liquidator should settle curial proceedings, and if so, on what terms);

(c) whether a liquidator should act on his commercial judgment to postpone a sale because he recognises his legal duty ordinarily requires him to reduce the company's assets into cash as soon as possible and to distribute (an example is *Re Statewide Investments Ltd*); or

(d) where there are two or more competing purchasers for the company's property and the liquidator can see that it may be alleged that the liquidator has acted mala fide or in an absurd or unreasonable or illegal way, *see Re Bayswood Pty Ltd* [1981] 6 ACLR 107 at 113.

[63] *Sanderson* was followed in *Re Kian Joo Holdings Sdn Bhd (in liq); Mohd Jabbar bin Abdul Majid* [1999] 6 MLJ 352.

[123] None of the conditions or circumstances described above present in these appeals, and even though the liquidators may have made that claim; it is for the court to decide.

[124] The issue then arises as to whether UOB Singapore was in fact, enforcing its rights, powers and remedies through UOB Nominees; and did it and could it have validly done so without proving its debt at the level of USSB which had gone into liquidation. It was for this and the other reasons already dealt with earlier that learned counsel for USSB and Equiticorp submitted that the s 237(3) route amounted to a backdoor attempt at excluding all the other creditors and contributories of USSB, that UOB Singapore through UOB Nominees were 'stretching' their rights qua shareholder of the CCSB shares.

[125] In our respectful view, these concerns and objections of USSB and Equiticorp are valid and founded. And, it is because of these concerns and objections that it behoves on the liquidators of CCSB to settle the list of contributories under ss 214 and 244 and 'to place on the provisional list the names of persons who may later succeed in showing that their inclusion on the final list of contributories is not warranted;' see *McPherson's Law of Company Liquidation*, p 603.

[126] Section 214 deals with the liability as contributories of present and past members while s 244 deals with the settlement of the list of contributories. Section 244 states:

244 Settlement of list of contributories and application of assets.

(1) As soon as may be after making a winding up order the Court shall settle a list of contributories and may rectify the register of members in all cases where rectification is required in pursuance of this Part and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

(2) Notwithstanding subsection (1) where it appears to the Court that it will not be necessary to make calls on or adjust the rights of contributories, the Court may dispense with the settlement of a list of contributories.

(3) In settling the list of contributories the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others.

(4) The list of contributories when settled shall be prima facie evidence of the liabilities of the persons named therein as contributories.

[127] The liquidators have not undertaken the duties entrusted under ss 214 and 244; nor have they referred the matter to the committee of inspection or even approached the court for a dispensation of the list of contributories. Until they have undertaken that duty, s 237(3) is not available to them as yet — see *Re Phoenix Oil and Transport Co Ltd (No 2)* [1958] 1 All ER 158. We cannot agree with the line of submission that the learned judge, in proceedings under s 237(3) may undertake the exercise of settling the list of contributories under s 244. We are of the view that that is a separate overt exercise that must be dealt with first before the matter of approaching for directions under s 237(3) can even arise.

[128] We are also in agreement with learned counsel for USSB and Equiticorp that the earlier decisions in *TR Hamzah & Yeang Sdn Bhd v City Centre Sdn Bhd* and *North Plaza Sdn Bhd v United Securities Sdn Bhd* did not determine the issue of whether UOB Nominees is a contributory.

[129] In *TR Hamzah & Yeang Sdn Bhd v City Centre Sdn Bhd,* the issue before the court was the appointment of replacement liquidators with all concerned parties wanting the official receiver who was the provisional liquidator, replaced. The High Court found that UOB Nominees had the locus standi under s 4(1) to nominate a replacement since they are fully paid up shareholders of the CCSB shares. In *North Plaza Sdn Bhd v United Securities Sdn Bhd*, the issue before the court was the removal of caveats lodged over the CCSB lands. USSB had applied for the removal of the caveats in its capacity as beneficial owner of CCSB. For that purpose, the court was required to determine whether USSB was an 'aggrieved person' under s 327 of the National Land Code.

[130] In determining that issue, the Court of Appeal held that while it recognised that USSB had beneficial interest in the CCSB shares, only the registered owner of those shares came within the category of 'aggrieved person'. The court was not prepared to say that the term 'contributory' would extend to shareholders who have charged their shares as security for a loan and where those shares are registered in the name of a nominee company. In any case, the Court in *North Plaza Sdn Bhd*, was also not called to pronounce upon the issue of whether UOB Nominees was the sole and rightful contributory of CCSB.

[131] It is our view that both these pronouncements do not render the issue posed by the liquidators as answered and that the High Court was obliged to follow and adopt the findings therein. Having locus standi to move the court for the particular order does not necessarily nor ipso facto, in our view and as explained earlier, render UOB Nominees as contributory for the purposes of being liable to contribute towards the assets of CCSB or even to receive the surplus funds. That is a matter for specific determination under sections 214, 244 and 247, an exercise quite outside the ambit and remit of s 237(3). The jurisdiction and powers of the winding up sourt under ss 214, 244 and 247 must be properly invoked and not in the manner undertaken by the liquidators. The determination of the Court under s 247(2) cannot be invoked under or through the s 237(3) regime, especially when the relevant parties are not before the court and when s 237(3) are intended for uncontroversial and administrative matters only; and not for determination of rights of creditors and contributories.

[132] Section 247 states:

> 247 Claims of creditors and distribution of assets.
>
> (1) The Court may fix a date on or before which creditors are to prove their debts or claims or after which they will be excluded from the benefit of any distribution made before those debts are proved.
>
> (2) The Court shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto.
>
> (3) The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks fit.

[133] Lastly, we find that the question of the application of the surplus funds is premature, as remarked earlier in this judgment. The distribution can only be held by a liquidator after all the debts of a wound up company have been settled; as expounded by Judith Prakash J in *Re Jiangshan Investment Consortium Ltd (in liquidation)* [2007] 3 SLR 614; [2007] 3 SLR (R) 614.

A **[134]** From the terms of the 'directions' sought, the debts have yet to be settled, and even if the liquidators were confident that there will be surplus of funds after the settlement of CCSB's debts as owed to its unsecured creditors and lawful outgoings such as liquidation costs and expenses'; the payment to UOB Nominees and UOB Nominees' subsequent payment of those funds to
B UOB Singapore could not be validly undertaken until and unless that settlement had taken place. As it is, we understand that there has already been payment out of some RM240m, even before that duty has been discharged.

C **[135]** Given that the list of contributories has not been settled under s 244 and this provision must be read with the whole gamut of related duties and powers found in the Companies (Winding-Up) Rules 1972 such as rr 71 and 72 (on application to court to vary the list of contributories and the variation of or addition to the list of contributories); what with r 102 (return of capital to
D contributories) requiring the liquidators to settle the list of contributories; and we understand that was never undertaken; and with UOB Nominees not even having filed its proof of debt as yet, we find the whole exercise under s 237(3) highly improper.

E **[136]** We further agree with the submissions of learned counsel for USSB and Equiticorp that the effect of the decision of the High Court is to ultimately settle the debts of the holding company, USSB (which is highly disputed) at the subsidiary level, CCSB. Such an exercise violates all principles of corporate governance and liquidation of companies.

F CONCLUSION

[137] We are therefore, unanimous in our determination that there are merits in both appeals.

G **[138]** To recapitulate, on the issue of the validity of the orders granted, we are of the considered view that the orders were erroneously granted because the orders cannot properly and validly fall within the purview and ambit of s 237(3). The orders sought were not properly directions on administrative
H matters but were orders which impinged on the substantive rights of the parties including those not before the winding up court.

[139] We agree with learned counsel for USSB and Equiticorp that there is serious doubt that the security documents will allow UOB Nominees to be
I paid any of the surplus funds, as contributory, sole or otherwise. Such a question cannot in any case, be determined using s 237(3). There are many other provisions under the Companies Act such as ss 214, 244 and 247, aside from the Winding-Up Rules made thereunder which are at play, and have not been invoked or complied with.

[140] The appeals are therefore allowed, the order of the High Court is set aside. We further order that the monies paid to be refunded in full to the liquidators of CCSB.

Appeals allowed and order of High Court set aside.

Reported by Nabilah Syahida Abdullah Salleh